VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Jan. 7, 2022

ROGER CONNER v. CENTRA SUPPORT BUILDING
SENTRY CASUALTY CO, Insurance Carrier
SENTRY CASUALTY INSURANCE COMPANY, Claim Administrator
Jurisdiction Claim No. VA02000034352
Claim Administrator File No. 55C552570
Date of Injury December 27, 2019

Robert E. Evans, Esquire
For the Claimant.

Jesse F. Narron, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The defendants request review of the Deputy Commissioner's July 27, 2021 Opinion finding the claimant suffered a compensable injury by accident. We REVERSE.

I. Material Proceedings

The claimant filed an April 15, 2020 claim alleging an injury to the right foot and ankle occurring December 27, 2019. He sought medical benefits, reimbursement for mileage, and temporary total disability from January 1, 2020 to September 30, 2020. The employer defended the claim on the grounds that: (1) the claimant did not suffer an injury by accident arising out of

and in the course of employment; and (2) there was no causal connection between the disability or medical treatment and the injury.[1]

Following an evidentiary hearing, the Deputy Commissioner issued a July 27, 2021 Opinion. She found the claimant suffered compensable injuries to his right foot and ankle, explaining:

> In the present case, we find the claimant has proven an injury by accident that arose out of the employment. The claimant's job required an extensive amount of walking. The claimant, who we found to be credible based on our observation of his demeanor and body language at the hearing, testified that he walked approximately five miles per day. He suffered from bilateral neuropathy in his feet and as a result, had a lack of feeling in his feet. When he wore shoes that were above his ankle, he did not feel the sore that developed and he continued to walk and work his entire shift. It was not until he removed his shoes at home that he observed the injury. As noted by Dr. Chandler, if the claimant had normal sensation, then he would have developed a blister, felt it and tended to it. The extensive walking in the above-the-ankle shoe resulted in the injury.
>
> In making our determination, we considered the claimant's wearing of the above-the ankle shoe at home prior to, and after, work. We considered the amount of walking done at home would have been insignificant compared to the approximately five miles of walking at work. Even had the claimant developed the blister at home before work, the extensive walking at work only aggravated that pre-existing blister. However, it is doubtful that the amount of walking at home would result in the extensive wound shown in the claimant's photograph and described in the medical records. The claimant testified he wore the shoes for approximately one hour before work. He also testified it took him 30 minutes to drive to work. Thus, he walked in the shoes for approximately 30 minutes before work. Therefore, we find the claimant suffered a compensable injury by accident that arose out of the employment.

[1] Subject to their defenses, the defendants stipulated to the alleged period of disability. They also agreed to reimburse the claimant for mileage to an independent medical examination.

> We also find the claimant's treatment and disability were causally connected to the work injury. Dr. Gondi opined the claimant's wound was caused by the extensive walking required by his job. Both Dr. Gondi and Dr. Chandler related the claimant's treatment to the work injury. Given the stipulation by the defendant, we find the claimant entitled to the indemnity benefits for the period requested.

(Op. 10-11.)

The defendants filed a timely request for review. They assign error to the Deputy Commissioner's findings that: (1) the claimant suffered a compensable injury by accident arising out of the employment; (2) the claimant's treatment and disability were causally related to the alleged work injury; and (3) the claimant was a credible witness.

II. Findings of Fact and Rulings of Law

The Virginia Workers' Compensation Act "requires a claimant to prove, by a preponderance of the evidence, (1) an 'injury by accident' or occupational disease, (2) arising out of, and (3) in the course of, the employment.'" *City of Charlottesville v. Sclafani*, 300 Va. 212 (2021) (quoting *Morris v. Morris*, 238 Va. 578, 584) (1989)). "To demonstrate an injury by accident 'a claimant must prove that the cause of his injury was an identifiable incident or sudden precipitating event and that it resulted in an obvious sudden mechanical or structural change in the body.'" *Id.* (quoting *Morris*, 238 Va. at 589). We have reviewed the record in its entirety, and find the claimant failed to meet his burden of proving a compensable injury by accident.

On December 27, 2019, the claimant was working as a valet at a hospital. His job duties included taking customer cars from the terrace down to the parking lot. Cars were parked in an area the claimant estimated was a ten-minute walk from the hospital. Occasionally customers needed things from their cars, requiring the claimant to retrieve a particular car two or three times.

He also provided information to customers and took them to the hospital admission desk. He sometimes had to walk around or through the hospital building. The claimant estimated he walked approximately five miles in a normal day at work. The hours he worked were 7:00 or 7:30 a.m. to 5:00 p.m., including a thirty-minute lunch break. The claimant estimated he walked ninety percent of the time spent working. He testified that December 27, 2019 was a normal work day.

The claimant is diabetic. His left leg was amputated and he wears a prosthetic. He has had right leg neuropathy for twenty years, which causes him to have decreased sensation in his foot. He looks at his right foot and ankle everyday because his doctor told him to pay close attention to those body parts since he is diabetic. There was nothing wrong with the claimant's foot or ankle on the morning of December 27, 2019 when he got dressed for work. The employer did not have any footwear requirements, other than that he had to wear black shoes. He usually wore diabetic shoes or inserts to work. On December27, 2019 he wore some boots that came up above his ankle. He had the boots for at least a year and wore them several times a week when he was doing farm work. He did not do much walking on the farm since he was either in a truck or tractor. December 27, 2019 was the first day he wore the boots to work. He put the boots on thirty minutes before he left for work, and then it took him thirty minutes to drive to work. He worked until about five in the afternoon, and then it took him about an hour-and-a-half to drive home.

When he got home he took his shoes and work clothes off. He noticed the wound on his right ankle. He testified at hearing that he noticed the wound at 6:30 pm, while his deposition testimony was that he noticed the wound around 8:00 or 8:30 pm when he took off his shoes right before bed. He looked at his right leg and was devastated because he thought he was going to lose his leg. A photo of the claimant's foot taken January 13, 2021 shows a large, round open wound

on his right ankle bone (Defs.' Ex. 2.) The claimant testified the wound was the same size as it is in the photo when he noticed it on December 27, 2019. The claimant denied having any kind of wound on his right ankle, or any similar condition in his right ankle and foot, before December 27, 2019. The claimant recalled he had an ingrown bone on his toe removed by Dr. Gondi, and stated that was the only thing that had ever been wrong with his right foot. He denied ever having an ulcer on his right foot or right toe before December 27, 2019. On cross-examination, when confronted with an April 21, 2008 medical record stating he had a diabetic ulcer on his right foot, the claimant maintained he had not had any ulcers on his foot.

Medical records from 2008, 2011, and 2013 reflect the claimant suffered from right great toe and foot ulcers, as well as peripheral neuropathy. In July 2018, the claimant was seen at OrthoVirginia for chronic right toe pain. Dr. Gautham Gondi surgically removed a bone spur over the claimant's right great toe. The claimant was treated for wound closure difficulties. As of November 2018, the incision was well-healed.

On January 8, 2020, the claimant was seen by his primary care physician, Dr. R. Randolph Duffer, for a sore on the right ankle and side of right foot which had been present for one week. The claimant ultimately came under the care of Dr. Gondi, who performed surgical wound debridement.

Dr. Gondi sent an August 13, 2020 letter to claimant's counsel, in which he opined, to a reasonable degree of medical certainty, that:

> 1. On December 27, 2019 Mr. Conner sustained a work injury resulting in a structural change in his body, specifically an open wound on his right ankle.
> 2. The injury on December 27, 2019 was caused by Mr. Conner's performance of his work activity, which required extensive walking to perform the duties of a parking valet, far more walking than he conducted daily outside of work activity.

> While Mr. Conner wore the above ankle shoes to work for the first time on December 27,2019, prior to December 27, 2019, Mr. Conner had previously worn the above ankle shoes in farm activity on more than 100 occasions over a one-year period, walking between thirty and sixty minutes on those many occasions, without any injury to his right ankle.
> 3. The open wound injury was sustained at a specific particular time during, and as a result of, the performance of work duties on December 27, 2019. The open wound injury did not spontaneously appear at the end of the work day as a result of Mr. Conner's cumulative work activity on that date.
> 4. The open wound injury was not caused by Mr. Conner's diabetic condition. An injury caused by a diabetic condition typically appears on the bottom of the foot and works upwards, it does not begin on the ankle. The only involvement of the diabetic condition is that Mr. Conner's lack of protective sensation to pain meant he did not feel the opening of the wound at the specific particular time he sustained that injury on December 27, 2019, and did not otherwise experience the pain sensation from the injury during the workday.

The claimant was seen by Dr. James T. Chandler for an independent medical examination on December 11, 2020. Dr. Chandler's impression was "right ankle ulcer, work-related, healed." He opined:

> The wound likely occurred over a period of time on Dec 27,2020[2] from ill fitting shoes, not likely a sudden single event. His preexisting diabetes is responsible for the wound, in that he has decreased sensation; had he had normal sensation, an ill fitting pair of shoes would likely cause a blister that he would attend to, and not extend down to a wound requiring bone debridement. The medical treatment since January 2020 has been reasonable and necessary, and causally related to the wound in question. The patient was unable to work from January 1, 2020 until he was released by Dr. Gondi.

The evidence established the claimant developed the right ankle wound from wearing boots while working on December 27, 2019. He did not see the wound prior to work, performed his work duties, and noticed the wound shortly after arriving home from work. Both Dr. Gondi and Dr. Chandler attributed the claimant's injury to work. However, these circumstances are

[2] Given the context, we presume the date is a typographical error and that Dr. Chandler was referring to December 27, 2019.

insufficient to establish a compensable injury by accident.[3] The Supreme Court of Virginia has explained:

> [T]he requisite causative event must be more than a simple reference to a 'work activity;' it must be a specific occurrence that can be temporally fixed with reasonable accuracy. [*Morris v. Morris*, 238 Va. 578, 589 (1989).] Merely establishing that a claimant was engaged in work activity during the discrete time period in which the injury occurred is insufficient. *Id.* at 588.

Sclafani, 300 Va. at 221.

Furthermore, "injuries resulting from repetitive trauma, continuing mental or physical stress, or other cumulative events, as well as injuries sustained at an unknown time, are not 'injuries by accident' within the meaning of Code § 65.1-7 [now Code § 65.2-101]." *Morris v. Morris*, 238 Va. 578, 589 (1989); *see also Merillat Indus. v. Parks*, 246 Va. 429, 433-34 (1993). A cumulative injury is one "caused by the cumulative effect of many acts done or many exposures to conditions prevalent in the work, no one of which can be identified as the cause of the harm.'" *Sclafani*, 300 Va. at 224 (quoting *Aistrop v. Blue Diamond Coal Co.*, 181 Va. 287, 293 (1943)).

We acknowledge Dr. Gondi's opinion that the wound was sustained during a specific, particular time during the claimant's performance of his work duties. However, this opinion is inconsistent with his opinion as to the cause of the wound. Dr. Gondi opined the injury was caused by the claimant's work duties, which required extensive walking. "Extensive walking" is an activity that necessarily occurs over an extended period of time. Thus, we are more persuaded by Dr. Chandler's opinion that the wound likely occurred over a period of time on December 27, 2019 from ill-fitting shoes, not from a sudden, single event.

[3] Our conclusion does not depend on the credibility of the claimant's testimony. Assuming without deciding that the Deputy Commissioner correctly found the claimant's testimony credible and entitled to preponderating weight, the circumstances described do not constitute a compensable injury by accident.

We also recognize the claimant's diabetic condition prevented him from feeling the wound form. However, it remains the claimant's burden to prove the injury was caused by a "specific occurrence that can be temporally fixed with reasonable accuracy." *Sclafani,* 300 Va. at 221. The approximately nine-hour period of work activity on December 27, 2019 does not meet this standard. The claimant's work day included a lunch break, moving cars, and walking at various times. "[A] claim asserting that an injury occurred during a time period where multiple potential causative events occur is not sufficiently temporally precise to establish a compensable injury." *Id.* at 222. Furthermore, to the extent the claimant's injury was the cumulative effect of walking throughout the workday, such an injury is likewise not compensable under the Act.

For these reasons, we find the claimant failed to prove a compensable injury by accident.[4]

III. Conclusion

We REVERSE the July 27, 2021 Opinion.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within thirty (30) days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerk's Offices of the Commission and the Court of Appeals of Virginia.

[4]As the claimant did not suffer a compensable injury by accident, he is not entitled to medical or wage loss benefits.